COURT OF APPEALS
DECISION
DATED AND FILED

DECEMBER 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-1858-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

LORINO'S CAR WASH WEST, INC., A WISCONSIN CORPORATION,

PLAINTIFF-APPELLANT,

V.

BECKER TRUST NO. 1,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: ARLENE D. CONNORS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Lorino's Car Wash West, Inc., operated a car wash in West Allis pursuant to a lease with Becker Trust No. 1. The lease expired on November 30, 1996, but Lorino's had the option to renew the lease for another five years. Lorino's attempted to exercise the option, but failed to do so in a

timely manner, and Becker declined to extend the lease. In the underlying suit, Lorino's sought a court order requiring Becker to honor its attempt to exercise the lease option. The circuit court granted summary judgment to Becker, holding that Lorino's had failed to timely exercise its option and that Becker was therefore not required to extend the lease. By order dated July 30, 1997, this case was submitted to the court on the expedited appeals calendar. We agree with the circuit court that Becker was entitled to summary judgment and we therefore affirm the circuit court's order.

The relevant facts are undisputed. On November 30, 1981, Lorino's entered into a lease with Al Becker for a West Allis location to operate a car wash. The lease was for ten years, but contained two five-year renewal options. The lease required that Lorino's, to exercise the renewal options, must "in writing notify lessor of its exercise of such option to renew at least 60 days and not more than 120 days prior to the termination of the original term or any extension exercised…."

Al Becker later died, and the property was transferred to a trust. In 1991, Lorino's timely notified the trust that it was exercising its renewal option, and the lease was renewed through November 30, 1996.

In 1996, Lorino's notified Becker on October 9, 1996, that it wished to exercise its renewal option. That notice was late under the terms of the lease, since it came only fifty-two days prior to termination of the lease. Becker declined to accept the extension because it was not timely, and Becker notified Lorino's that the lease would be terminated on November 30, 1996.

Lorino's then commenced the underlying action in the circuit court, seeking a declaration that its renewal notice was binding on Becker. Lorino's also

sought an injunction prohibiting Becker from terminating Lorino's tenancy during the pendency of the trial. Becker moved the circuit court for summary judgment, contending that the terms of the lease were unambiguous and specific, requiring Lorino's to give notice of its intent to exercise the option no less than 60 days prior to termination of the lease. Noting that it was undisputed that Lorino's had failed to meet that deadline, Becker argued that it was within its rights in deciding to terminate the lease.

Lorino's opposed summary judgment, arguing that "special circumstances" had caused its tardiness in exercising the option. Specifically, it noted that its "operating stockholder," Joseph N. Lorino, had suffered "serious health problems resulting from a heart transplant that caused the notice to be late." The circuit court rejected Lorino's argument, however, noting that there was no Wisconsin law requiring an examination of "special circumstances." Instead, it noted that Wisconsin case law indicated that time is of the essence when exercising an option, and that failing to exercise the option timely deprived the option grantee the absolute right to exercise it. *See* ***Livesey v. Copps Corp.***, 90 Wis.2d 577, 582, 280 N.W.2d 339, 342 (Ct. App. 1979).

This court owes no deference to a circuit court's decision to grant summary judgment; rather, we independently apply the methodology set forth in § 802.08(2), STATS., to the record *de novo*. *See* ***Garcia v. Regent Ins. Co.,*** 167 Wis.2d 287, 294 481 N.W.2d 660, 663 (Ct. App. 1992). Summary judgment will be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***Garcia***, 167 Wis.2d at 294, 481 N.W.2d at 663.

We, like the circuit court, are satisfied that ***Livesey*** dictates the result in this case. Although we agree with Lorino's that ***Livesey*** is somewhat distinguishable, we disagree that the legal principles articulated in that case do not control. In ***Livesey***, this court noted:

> Time is ordinarily of the essence of an option. An option does not bind its grantor "unless accepted by the holder within the time limited therein, and according to its terms, and … rights under such an option expire on the date limited, without notice or declaration of forfeiture."

Livesey, 90 Wis.2d at 582, 280 N.W.2d at 342 (citations omitted). Applying this analysis to the facts of this case required summary judgment to Becker. Lorino's was required to give notice of its desire to exercise its option no later than sixty days prior to expiration of the lease. It did not meet this deadline. Lorino's failure relieved Becker of any obligation to honor the option.

Lorino's largely concedes that the current state of Wisconsin law supports the grant of summary judgment to Becker. It contends, however, that the circuit court should have considered the "special circumstances" that existed during the renewal period which, it contends, provide the basis for "equitable relief" excusing its failure to timely exercise the option. In support of its contention, it suggests that case law from other jurisdictions generally supports this approach.

We decline to accept Lorino's approach for two reasons. First, this court is primarily an error-correcting court. *See* ***Hillman v. Columbia County***, 164 Wis.2d 376, 396, 474 N.W.2d 913, 920 (Ct. App. 1991). We can see no basis for creating an exception to Wisconsin's long-standing rules holding parties to a lease to the terms of that lease.

Second, however, even among the cases cited by Lorino's, "special circumstances" often connote circumstances that render performance of the contract impossible, *see, e.g.,* ***Monihon v. Wakelin***, 56 P. 735 (Ariz. 1899) (physical and mental incapacity during option-exercise period may excuse noncompliance), or that indicate the absence of neglect, fraud, or inadvertence, *see, e.g.,* ***J. DeBenedictis & Sons Bldg. Corp. v. Lindon***, 539 N.Y.S.2d 670 (1989) (tenant with Alzheimer's disease relieved from failure to renew lease because failure could not be viewed as neglect, fraud, or inadvertence). None of the special circumstances cited by Lorino's in the circuit court demonstrated with any specificity that it was impossible for Joseph Lorino, who had had a heart transplant eleven months earlier, to exercise the option during the sixty-day option period or to delegate that responsibility to someone else in Lorino's corporate structure. Similarly, there was nothing specific in Lorino's affidavit to indicate that the failure to exercise the option or to delegate that responsibility was not due to neglect. Rather, Joseph Lorino's affidavit in opposition to summary judgment merely cited his heart transplant of eleven months earlier, and noted that, as a result of the transplant, he was taking various drugs that "affect[ed] my mood, memory, and concentration." There was nothing specifically explaining his failure to renew the lease during the option period. Thus, even if we were to hold that equitable relief can be afforded when special circumstances are present, we would not do so here because the information offered by Lorino's was not sufficiently specific to avoid summary judgment. *See, e.g.*, ***Larson v. Kleist Builders, Ltd***., 203 Wis.2d 341, 345, 553 N.W.2d 281, 283 (Ct. App. 1996) (summary judgment appropriate where party opposing summary judgment fails to offer "specific evidentiary facts to demonstrate a genuine issue for trial").

Finally, we note that counsel for Becker cites, in the respondent's brief, an unpublished opinion of this court, asking the court to consider the facts and circumstances of that decision when deciding this case. Such a citation violates RULE 809.23(3), STATS., which states that this court's unpublished opinions are of no precedential value and "may not be cited in any court of this state as precedent or authority…." We impose a sanction of $50 on Becker's counsel for violation of this rule. The sanction shall be paid to the clerk of this court by counsel personally, and counsel is prohibited from passing this cost on to the client.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.